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No. 99-1426

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SENATOR ORRIN HATCH AND REPRESENTATIVE TOM BLILEY IN SUPPORT OF CROSS-PETITIONERS

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QUESTION PRESENTED

Whether the EPA Administrator is permitted, in setting a National Ambient Air Quality Standard ("NAAQS") under Section 109 of the Clean Air Act, to exercise her judgment by taking account of considerations such as the cost-effectiveness and net benefits of alternative risk levels that would protect the public health?

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Senate Debate on S. 4358 (Sept. 21, 1970), *reprinted in* 1 Committee on Pub. Works, 93d Cong., *A Legislative History of the Clean Air Act Amendments of 1970* (Comm. Print 1974) (remarks of Sen. Muskie) 17

Senate Debate on S. 4358 (Sept. 22, 1970), *reprinted in* 1 Committee on Pub. Works, 93d Cong., *A Legislative History of the Clean Air Act Amendments of 1970* (Comm. Print 1974) (remarks of Sen. Randolph) 18

Senate Debate on S. 252 (June 8, 1977), *reprinted in* 3 Committee on Env't and Pub. Works, 95th Cong., *A Legislative History of the Clean Air Act Amendments of 1977* (Comm. Print 1978) (remarks of Sen. Muskie) 22

Senate Debate on S. 252 (June 10, 1977), *reprinted in* 3 Committee on Env't and Pub. Works, 95th Cong., *A Legislative History of the Clean Air Act Amendments of 1977* (Comm. Print 1978) (remarks of Sen. Muskie) 18

SCHOLARLY AUTHORITIES

C. Boyden Gray, *The Clean Air Act Under Regulatory Reform*, 11 Tul. Envtl. L.J. 235 (1998) 12

Jan C. Semenza et al., *Heat-Related Deaths During The July 1995 Heat Wave in Chicago*, 335 New Eng. J. Med. 84 (1996) 12

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Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (1995) 4, 27

OTHER AUTHORITIES

Budget of the United States Government: Fiscal Year 1998 (1997) 3

Board on Env'tl Studies & Toxicology, National Research Council, *Research Priorities for Airborne Particular Matter: I. Immediate Priorities and a Long-Range Research Portfolio* (1998) 3

Stephen A. Breyer, *Breaking the Vicious Circle* (1993) 20, 21, 26

EPA, *Safeguarding the Future: Credible Science, Credible Decisions* (1992) 26

EPA, *Water Quality Standards Handbook* (2d ed. 1994) 19

Harvard Sch. of Pub. Health Presentation for the Monthly Meeting of Dep't Chairs, *Definition of Public Health Practice* (May 23, 1997) <http://www.hsph.harvard.edu/php/presentation/tsld002.htm> 7

HEW, *Air Quality Criteria for Particulate Matter* (1969) 16

HEW, *Air Quality Criteria for Sulfur Oxides* (1969) 16

Innovative Strategies and Econs. Group, EPA, *Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* (1997) 2, 3, 28

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Innovative Strategies and Econs. Group, EPA, Draft Document, *Regulatory Impact Analysis for Proposed Particulate Matter National Ambient Air Quality Standard* (Dec. 1996) 28

National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983) 20

National Research Council, *Science and Judgment in Risk Assessment* (1994) 21

Office of Air Quality Planning and Standards, *Review of the National Ambient Air Quality Standards for Particulate Matter, Policy Assessment of Scientific and Technical Information* (1996) 3

OMB, *Report to the President on the Third Anniversary of Executive Order 12866, Chapter 3* (Dec. 1996) <http://www.whitehouse.gov/OMB/inforeg/3_year_report.html> 8

President Clinton's Council on Sustainable Dev., *Sustainable America: A New Consensus for the Prosperity, Opportunity and a Healthy Environment for the Future* (Feb. 1996) <http://www.whitehouse.gov/PCSD/Publications/TF_Reports/amer-chap.2.html> 8

2 The Presidential/Congressional Comm'n on Risk Assessment and Risk Management, *Final Report: Risk Assessment and Risk Management in Regulatory Decision-Making* (1997) 20, 21

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INTEREST OF *AMICI CURIAE* [1]

Amicus Orrin Hatch is a Member of the United States Senate from Utah, and *amicus* Tom Bliley is a Member of the United States House of Representatives from Virginia. *Amici* are both concerned that the Environmental Protection Agency's ("EPA") implementation of the Act is contrary to congressional will and frustrates effective congressional and judicial oversight. Because EPA has been hamstrung by an erroneous judicial precedent that irrationally prevents the agency from considering the cost effectiveness of its regulations, EPA engages in a science charade wherein policy and economic judgments are masked as scientific determinations, and makes unreviewable regulatory determinations that undermine the statutory scheme.

INTRODUCTION

Section 109 of the Clean Air Act, 42 U.S.C. § 7409, unquestionably gives EPA a far-reaching mandate to protect the public health from dangerous air pollutants. The only issue in this case is whether the Act imposes a regime of regulatory irrationality and profligacy on the states and the American public, and forbids the EPA Administrator to apply the full range of her expert judgment to determine what standards are requisite to protect the public health. The Act does give the Administrator that discretion, despite the contrary decision of the Court of Appeals for the District of Columbia Circuit in *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980). That misguided precedent held that the Administrator was precluded from considering the cost-effectiveness or net benefits of a particular NAAQS in

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for any party authored this brief in whole or in part, and that Citizens for a Sound Economy has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Office of the Clerk of this Court. *See* Sup. Ct. R. 37.3.

exercising judgment to protect the public health, and instead must set NAAQS solely on the basis of the health effects of the pollutant itself. *Id.* at 1147-55.[2]

Applying the *Lead Industries* rule, in 1997, EPA issued a new and more stringent primary NAAQS level for ozone that would entail an incremental cost of up to $9.6 billion annually to attain, even though EPA valued the expected benefits of attainment at only $1.5 to $8.5 billion.[3] Yet, scientific evidence of dangers to public health from ozone did not drive this hugely consequential regulatory decision. After reviewing the available data and various alternative NAAQS (including maintaining the existing standard), the Clean Air Scientific Advisory Committee ("CASAC") advised EPA that "there is no 'bright line'" distinguishing any of the alternatives as "significantly more protective of public health."[4]

EPA's rulemaking for particulate matter ("PM") was equally dubious. EPA for the first time established a NAAQS for the finer fractions of PM (particles with a diameter of 2.5 microns and less, referred to as $PM_{2.5}$). EPA took that step despite its

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[2] EPA has endorsed *Lead Industries* as reflecting its view of section 109, but also regards it as binding precedent from which it has no discretion to depart. National Ambient Air Quality Standards for Particulate Matter; Final Rule, 62 Fed. Reg. 38,651, 38,683-89 (1997) ("*PM Rule*"); National Ambient Air Quality Standards for Ozone; Final Rule, 62 Fed. Reg. 38,855, 38,878-83 (1997) ("*Ozone Rule*"). The court below likewise regarded *Lead Industries* as binding. Pet. App. 15a.

[3] Innovative Strategies and Econs. Group, *Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12, ES-17 (1997) ("*Final RIA*"). Given *Lead Industries*, EPA considers itself legally precluded from using this analysis in setting NAAQS. *Id.* at ES-3.

[4] Letter from George Wolff, Chair, CASAC, to Carol Browner, Administrator, EPA, 3 (Nov. 30, 1995) (regarding CASAC closure on the primary standard portion of the staff paper for ozone).

acknowledgement of the "significant uncertainties" surrounding the health effects of PM,[5] *PM Rule*, 62 Fed. Reg. at 38,655, and despite Congress's funding of a large new research program to resolve scientific uncertainty about $PM_{2.5}$,[6] accompanied by an admonition to EPA characterizing promulgation of new PM standards as "premature." H.R. Conf. Rep. No. 104-812, at 70 (1996). EPA predicts (conservatively) that the annual national incremental cost of *partial* attainment with the new PM standard will be $8.6 billion, with full attainment by the year 2010 reaching $37 billion annually. *Final RIA* at ES-12 to ES-13.

SUMMARY OF THE ARGUMENT

If *Lead Industries* were correct, section 109 of the Act would be the odd statutory mandate that precludes the balancing of economic considerations and weighing of relative harms necessary to produce regulation in the public interest. The text and history of section 109 make clear that Congress did not in 1970 mandate such an extreme departure from basic tenets of sound risk management. Rather, the broad textual authority for the Administrator to set national standards for pollutants "that rea-

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[5] EPA staff, the National Research Council, the Congress, and the President have all emphasized the "unusually large uncertainties" that make promulgation of a $PM_{2.5}$ standard problematic. Office of Air Quality Planning and Standards, EPA, *Review of the National Ambient Air Quality Standards for Particulate Matter, Policy Assessment of Scientific and Technical Information* VII-41 (1996); Board on Env'tl Studies & Toxicology, National Research Council, *Research Priorities for Airborne Particular Matter: I. Immediate Priorities and a Long-Range Research Portfolio* 1, 2 (1998); H.R. Conf. Rep. No. 104-812, at 70 (1996) (noting, prior to rulemaking, that there were "insufficient data available for the Agency to decide what changes, if any, should be made to the current standard"); *Budget of the United States Government: Fiscal Year 1998*, at 81 (1997) (President requests research funds to "reduce the great uncertainty about PM's health effects").

[6] Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, Pub. L. No. 104-204, tit. III 110 Stat. 2874, 2909-10 (1996).

sonably may be anticipated to endanger public health and welfare," to exercise her "judgment" in setting standards "requisite to protect the public health," to determine what margins of safety are "adequate," to modify such standards after public comment as she deems "appropriate," all suggest that the Administrator is to apply her full expertise (in health sciences, environmental technology, and the socioeconomic effects of pollution and its control) in selecting from among alternative health-protective standards. There is simply no basis in the statute for EPA's false dichotomy between the setting of standards, which EPA claims must be free of any economic influence, and the implementation phase, which EPA claims is the unique moment when economic factors may be considered. The text and legislative history confirm that, in the absence of a determinate scientific answer as to when the public health is clearly endangered, Congress intended for the Administrator to consider the same factors in setting public health standards as the states did under the Air Quality Act of 1967.

Economic considerations such as cost-effectiveness are fundamental, non-controversial elements of risk management that Congress, the Administration, and in analogous contexts, EPA, have all embraced. Nothing in section 109 precludes consideration of these factors by the Administrator in setting NAAQS. Contrary to EPA's claims that Congress has by acquiescence ratified *Lead Industries*, subsequent legislation in the 1990s, including amendments to the Act itself, suggest that section 109 must be interpreted to favor the promulgation of cost-effective regulation.

Most fundamentally, adherence to *Lead Industries* has turned the NAAQS process into a charade. EPA does consider costs and balance harms when it sets a NAAQS, albeit covertly. It simply masks such judgments as scientific decisions, thus frustrating judicial, congressional, and public oversight. See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1617 (1995). Moreover, despite the clear

purpose of the Act to achieve attainment of national standards, EPA has effectively abandoned any attempt to do so. Having set untenable standards under the *Lead Industries* approach, EPA has devised—without statutory authorization, without explication of its reasons or evidence, and without effective judicial or congressional review—arbitrary cost caps on source compliance that will subvert attainment. The will of Congress is undone, and EPA has effectively drawn its own charter. This Court should overrule *Lead Industries* to revive the rational scheme Congress devised, and to permit the EPA to consider all factors relevant to the proper level of NAAQS when science does not provide a clear answer.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT PRECLUDE EPA'S CONSIDERATION OF ECONOMIC AND NON-HEALTH FACTORS IN SETTING AIR QUALITY STANDARDS.

The Clean Air Act, and its history, evince Congress's intention to authorize extraordinary measures to safeguard the public health from the dangers of air pollution. They do not support the conclusion that section 109 is like the well-known "Delaney Clause,"[7] a categorical ban of carcinogenic additives that prohibited the exercise of any policy judgment.

To be sure, this Court rightly characterized the original Act as " 'technology-forcing' " and "expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257 (1976) (quoting *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 91 (1975)); see also S. Rep. No. 91-1196, at 2-3 (1970);

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[7] *See* 21 U.S.C. § 348(c)(3)(A) ("no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal").

H.R. Rep. No. 101-490, Pt. 1, at 145 (1990). But, with scant textual analysis and misplaced reliance on legislative history, *Lead Industries* leapt from the incontrovertible proposition that Congress placed no feasibility constraints on the EPA's ability to protect the public health to a far more radical and unsupported conclusion: namely, that the Act banishes *any* consideration of economic consequences from EPA's weighing of the appropriate risk levels, in the face of scientific uncertainty, that would protect the public health with an "adequate" margin of safety. 647 F.2d at 1148-56. A "survey of the totality of the statutory scheme" of the Clean Air Act, *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978), manifests the error of *Lead Industries*.

A. *Lead Industries* Irrationally Excluded Economic Considerations From NAAQS Standard-Setting.

This Court's task is to "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole," leavening its interpretation with "common sense as to the manner in which Congress is likely to delegate a policy decision of … economic and political magnitude to an administrative agency." *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000) (internal quotation marks and citations omitted). Cost-effectiveness is a matter of common sense, and nothing in the text of the Act—or for that matter its history, structure, or purposes—ordains the result of *Lead Industries* and prohibits EPA from protecting the public health in a cost effective manner.

While public health trumps private costs under the Clean Air Act, "public health" is, like nearly everything else in regulatory life, relative. It turns on the statistical incidence of various health hazards spread out over disparate sub-populations comprised of differentially exposed, susceptible, and sensitive individuals with varying degrees of acute, chronic, and reversible disease or discomfort. Under some circumstances, the available

data will be so clear-cut, and the risk breakpoints so bright, that "protect[ing] the public health" with "an adequate margin of safety" reduces to an exercise in pure science. That is not the case for the NAAQS in question. For ozone, as noted above, EPA's own scientific advisers reported the absence of a "bright line." For particulate matter, the risks are greater, but are so rife with the uncertainty acknowledged by EPA, the President, and Congress that they may have no impact on public health at all.

Overruling *Lead Industries* would thus not displace the "public health" mandate. It would preserve that mandate by maintaining EPA's authority to abate any significant health risks, while obligating EPA to consider and disclose the point on the continuum of relative protection where it believes the public health is best served. Cost-effective environmental protection is not a matter of saving business or government money; it is a *public* health benefit to spend the amount of money that is needed, and not more, to abate significant public health risks. Protection of the public health necessarily involves "the rational management and equitable distribution of health care resources." [8] Money not wasted can be redirected to produce other environmental, health, and safety benefits.

Lead Industries' exclusion of economic considerations from environmental decision making was not only erroneous when decided, as will be demonstrated below, but the decision also stands decidedly out of the mainstream of environmental policy. The *Lead Industries* straitjacket is fundamentally at odds with the nearly universal understanding, shared by the current Administration, that overall social well-being suffers "if environmental protection strategies deliver low results at a high cost. Resources for other economic and social needs will be diverted

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[8] Harvard Sch. of Pub. Health Presentation For The Monthly Meeting Of Dep't Chairs, *Definition of Public Health Practice* (May 23, 1997) <http://www.hsph.harvard.edu/php/presentation/tsld002.htm>.

if strategies to achieve environmental goals are not designed to achieve results in the most cost-effective way." [9] The President has issued an executive order requiring, among other things, the "design [of] regulations in the most cost-effective manner to achieve the regulatory objective." Exec. Order No. 12866, *reprinted in* 1993 U.S.C.C.A.N. B82, B83 (1993). That Order opens with a proposition that explains precisely why *Lead Industries* is misguided and must not survive:

> The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society . . . .

Id. at B82. The Office of Management and Budget ("OMB") minced no words in affirming the same principle: "The use of sound economic analysis in the design of regulations, such as the benefit-cost and cost-effectiveness analyses called for in E.O. 12866, is vital to generating maximum health, safety, environmental, and other benefits to society from the limited resources available." OMB, *Report to the President on the Third Anniversary of Executive Order 12866, Chapter 3* (Dec. 1996) <http://www.whitehouse.gov/OMB/inforeg/3_year_report.html>.[10] But as "vital" as such economic considerations are to generating maximum health and environmental benefits, *Lead Industries* would allow none of them. It had no warrant in the statute for doing so.

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[9] President Clinton's Council on Sustainable Dev., *Sustainable America: A New Consensus for the Prosperity, Opportunity and a Healthy Environment for the Future* (sic) (Feb. 1996) <http://www.whitehouse.gov/PCSD/Publications/TF_Reports/amer-chap2.html>.

[10] Congress has also codified cost-effectiveness principles in legislation discussed *infra*, at 24-25.

B. The Statute Does Not Limit EPA's Discretion To Consider Cost-Effectiveness

This Court does not lightly imply limits in statutes on the factors an administrative agency may consider in pursuing its statutory mandate. See, *e.g.*, *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 497 (1985); *Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151, 168 (1981); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 245-46 (1978). Given the importance of costs to sound risk management in health-and-safety regulation, it is always presumed that the implementing agency may consider them unless there is "a rather express congressional direction" to the contrary. *Michigan* v. *EPA*, No. 98-1497, 2000 WL 180650, at *12 (D.C. Cir. Mar. 3, 2000). No such direction can be gleaned from section 109.

1. Section 109 Calls For The Administrator, In The Absence Of A Bright Scientific Line, To Exercise "Judgment" In Determining What Is "Requisite To Protect The Public Health."

As more fully explored in the briefs of cross-petitioners, the text of section 109 neither contains nor suggests any strict limitation on the factors EPA may consider in determining the precise numeric level at which to set a NAAQS. Congress specifically provided that the level of standards is a matter for "the judgment of the Administrator," to be modified as she deems "appropriate" after public comment. 42 U.S.C. § 7409(b)(1), (d)(1). See *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 512 (1981) (finding such language to suggest wide discretion to consider any factor, including costs, absent contrary statutory directive). To be sure, the Administrator's judgment must be based on the section 108 air-quality criteria, 42 U.S.C. § 7409(b)(1), but this requirement does not dictate that the Administrator only consider one type of factor (disease incidence) and not others (*e.g.*, cost-effectiveness of alternatives for promoting health) in choosing among various standards that would

be consistent with those criteria. Nor can such a limitation on the Administrator's judgment be implied from the requirement that she pick a standard "requisite to protect the public health," *id.* Unlike a "Delaney Clause" straitjacket, the Clean Air Act calls for judgment and balance, not mechanical application. In selecting what treatment prescribe is "requisite" to ensure the patient's health, a good doctor would consider not only how the disease would respond to each treatment, but how the patient's overall health and quality of life would be affected. Congress expected no less of the Administrator.

That Congress gave the Administrator freedom of judgment in choosing among health-protective standards is confirmed by the limitation on EPA's power to set NAAQS only for pollutants "which may *reasonably* be anticipated to *endanger* public health or welfare," 42 U.S.C. § 7408(a)(1)(A) (emphasis added), and by section 109's directive that the Administrator "allow[] an adequate margin of safety" in setting the standard, *id.* § 7409(b)(1). Such "safety" and "reasonableness" language suggests that Congress intended EPA to make inherently economic judgments about the relative significance of the risks in question. See *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 642 (1980) (plurality); *Michigan*, 2000 WL 180650, at *11-*12. Furthermore, while *Lead Industries* correctly noted that the margin-of-safety provision reflected concern over scientific uncertainty, 647 F.2d at 1150, such concern cannot explain why Congress gave the Administrator the discretion to choose any margin of safety that she deems "adequate." In enacting this language in 1970, Congress clearly did not mean for the Administrator to choose the most stringent health-protective margin of safety, as she would if she were considering only narrow health data. Congress was instead giving the Administrator discretion to consider all relevant factors.

Thus, nothing in section 109 requires the Administrator to blind herself to economic considerations and cost-effectiveness

in choosing among relatively health-protective standards. Such a reasoned approach is fully consonant with the Act, which, significantly, declares that "[a] primary goal of this chapter is to encourage or otherwise promote *reasonable* Federal, State, and local government actions, consistent with the provisions of this chapter, for pollution prevention," 42 U.S.C. § 7401(c) (emphasis added), and seeks to enhance not only "the public health and welfare" but also the "the productive capacity of its population." *Id.* § 7401(b)(1). See *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (statute should be interpreted "in light of the purposes Congress sought to serve").[11]

2. EPA Relies On A Legally False Dichotomy That Purports To Allow Economic Considerations For The Implementation Phase But Not For Standard-Setting.

The broad language of section 109 does not support the narrow *Lead Industries* rule "barring EPA from considering any factor other than 'health effects' relating to pollutants in the air." Pet. App. 15a. In defending *Lead Industries*, the Government tries to sap section 109 of its proper vitality in two ways: by importing a limitation from section 108 that Congress left out of section 109, and by limiting to section 110, which governs state implementation plans, the cost-effectiveness and other practical considerations that properly belong in section 109.

The Government contends that the broad term "public health" in section 109 is limited to the "health effects" specified in

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[11] The *Lead Industries* court felt it necessary to follow the advice given by this Court in *TVA* v. *Hill*, 437 U.S. 153 (1978), to reject the invitation to "view the. . . Act 'reasonably,' " *id.* at 194. *See* 647 F.2d at 1150-51. But *Hill* was a case in which completion of the costly Tellico Dam was irreconcilable with the statutory goal of saving the endangered snail darter. By contrast, considerations of cost-effectiveness are intrinsic, not opposed, to protection of the public health.

108(a)(2), which calls for the development of scientific criteria regarding the health effects which "may be expected from the presence of such pollutant in the ambient air." 42 U.S.C. § 7408(a)(2). See U.S. Opp. 10 ("Section 108(a)(2) makes no mention whatsoever of effects from *implementing* the NAAQS—it mentions only effects resulting from the presence of a criteria pollutant in the air"). But that construction renders Congress's choice of broader language in section 109 a nullity, and violates the canon of construction that Congress uses distinctive words in the same statute for a purpose. *Public Lands Council* v. *Babbitt*, 120 S. Ct. 1815, 1826 (2000). Congress intended the primary NAAQS to be based on the section 108 criteria, see 42 U.S.C. § 7409(b)(1), but chose broader language to give rein to the Administrator's expert regulatory judgment. Any interpretation suggesting that the Act's public-health mandate prohibits the Administrator from considering health tradeoffs is unreasonable and must be rejected.[12]

The Government also attempts to bleed section 109 of its content by contending that "costs or [other] alleged adverse effects," U.S. Opp. at 10, from compliance with a NAAQS come into play only at the implementation stage of section 110 of the Act, 42 U.S.C. § 7410, where "Congress provided the States

[12] For example, there is no conceivable reason why Congress would preclude EPA from taking into account evidence that further reductions of ozone may exacerbate ultraviolet radiation, and perhaps result in a net increase in cancer. C. Boyden Gray, *The Clean Air Act Under Regulatory Reform*, 11 Tul. Envtl. L.J. 235, 253-54 (1998). Moreover, a rational regulatory scheme would allow EPA to consider the substitution health risks (such as increased heat-related deaths) of more expensive air conditioning as utilities pass through NAAQS-related costs. *See* Jan C. Semenza et al., *Heat-Related Deaths During The July 1995 Heat Wave in Chicago*, 335 New Eng. J. Med. 84, 87 (1996) (finding air-conditioning access to be the single greatest protection from heat-related mortality, reducing it by 80%); Gray, *supra*, at 254-56 (recounting evidence that the poor will reduce their air conditioning usage to save money, with deadly consequences).

with flexibility in the implementation process to consider the economic and technical feasibility of attainment." U.S. Opp. at 13. According to the Government, given this scheme of state-by-state flexibility, it "would make little sense if EPA had to promulgate NAAQS based on an analysis of costs and related implementation factors at the outset of the regulatory process." *Id.* at 12.

There is, however, nothing in the statutory scheme or in-common sense which postpones assessment of the public health issues (as distinguished from the simpler pollutant-related effects) from section 109 to 110. As the detailed requirements of section 108 make abundantly clear, section 109 does not constitute the "outset of the regulatory process," but follows a very lengthy fact-gathering process designed to inform the rulemaking. Moreover, the Government's premise—that states individually have flexibility under section 110 to cope with the total public health and economic impact of the NAAQS—is way off base. As this Court noted in *Union Electric*, section 110 only permits states to consider costs in allocating industry burden if to do so would not interfere with meeting an attainment deadline. 427 U.S. at 268. But full attainment never occurred with the old ozone standard, and EPA does not foresee it for the new ozone standard or the new $PM_{2.5}$ standard. See *infra* at 27-29. Put another way, in the Government's view economics may be considered only when they don't really matter—*i.e.*, when a state is in attainment and its economy is not under stress.[13] Moreover, allowing state-by-state cost-related adjustments in

[13] The Government acknowledges as an afterthought that the limits of *Union Electric* reflect the fact that Congress "reserved to itself the prerogative of deciding—as a matter of legislative choice—whether and how to alter the statutory scheme if public health needs should prove to conflict with an industry's economic viability." U.S. Opp. at 13-14. But Congress did not put EPA in a straitjacket, and, as we show below, EPA does in fact exercise its own judgment to relax attainment goals on the basis of economic factors. *See infra* at 27-29.

the absence of full attainment would permit states to gain unfair advantage over competing states by imposing lower compliance costs, and would create impossible demands on downwind states, a condition Congress expressly prohibited in the 1990 Amendments. See *infra* at 24.

EPA's reading of the statute also conflicts with a telling provision of Section 109 added in the 1977 Amendments, but ignored by *Lead Industries*. This new provision, Section 109(d)(2), provides that CASAC must advise EPA about, among other things, "any adverse public health, welfare, social, economic or energy effect which may result from various strategies for attainment and maintenance of such" NAAQS. 42 U.S.C. § 7409(d)(2)(C). The court below, bound by *Lead Industries*, dismissed the relevance of this provision by ruling that the "advice required in Section 109(d)(2)(C)(iv) is pertinent only to the EPA's duty under Section 108 to provide the States with control strategy information." Pet. App. 21a. But this is plainly wrong, for nothing in the text or logic of the statute confines CASAC's advice to the states only. The court cites section 109(d)(1) as authority for the state-advice limitation, *id.*, but that section says nothing about either the states or subsection (d)(2). Indeed, it is counterintuitive as well as countertextual to exclude the advice CASAC is required to provide under 109(d)(2) from section 109's standard-setting process. This is simply another case of EPA donning blinders to constrict the exercise of expert judgment.

In sum, the claimed dichotomies between health and economics, and between NAAQS promulgation and state implementation, are false ones. EPA cannot very well "protect the public health" without considering all factors, direct and indirect, that bear upon it.

3. The Legislative History Confirms That Congress Did Not Intend To Limit The Factors The Administrator May Consider.

In placing a rulemaking straitjacket on the EPA, *Lead Industries* relied principally on the legislative history. The many sources cited establish the uncontested proposition that there are no overriding technical or economic feasibility constraints on the Administrator's ability to set standards requisite to protect the public health, see 647 F.2d at 1148-55, but none supports the very different proposition that the Act does not "permit[] the Administrator to consider economic or technological factors in promulgating air quality standards," *id.* at 1150. A closer examination of the history of the 1970 Amendments shows that no such limit on the Administrator's discretion was contemplated.

Before the 1970 Amendments, the setting of standards was reserved to the states, subject to review and approval by the Secretary of Health, Education, and Welfare ("HEW"). Under the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, the Secretary of HEW issued air quality criteria and information on air pollution control techniques that included "technical data relating to the technology and costs of emission control" and "cost-effectiveness analyses," *id.* § 107(b)(1) & (c), 81 Stat. at 491. Upon receiving the criteria and control techniques, the states developed air quality standards, which were to be approved "if the Secretary determines that such State standards are consistent with the air quality criteria and recommended control techniques issued pursuant to section 107." *Id.* § 108(c)(1), 81 Stat. at 492. Significantly, Congress thus permitted considerations of costs and technology in setting the standards even though the 1967 Act was premised on the philosophy that "[c]onsiderations of technology and economic feasibility ... should not be used to mitigate against protection of the public health." S. Rep. No. 90-403, at 2 (1967). This is the very distinction that *Lead Industries* missed.

The standards set by the states under the 1967 Act were acknowledged to be "social-political decisions" by the states that reflect "the desired socio-economic status of those particular regions," but which were to be both based on and constrained by HEW's air-quality criteria. *Hearings Before the Subcomm. on Air and Water Pollution* (1970) ("*1970 Hearings*"), *reprinted in* 2 Committee on Public Works, 93d Cong., *Legislative History of the Clean Air Act Amendments of 1970*, at 1183-84 (Comm. Print 1974) ("*Legislative History*") (Statement of Dr. John T. Middleton, Commissioner, National Air Pollution Control Administration). HEW identified fixed numeric levels from the criteria documents which were to be a ceiling on the concentrations the state standards could allow, and would not approve more lenient standards. *Id.* at 1187. For the two pollutants discussed in the testimony, sulfur oxide and particulate matter, these were the levels where reliable scientific evidence established "probable" adverse health effects that were, in effect, significant risks: the 0.04 ppm annual mean for sulfur dioxide was associated with an increase in mortality from bronchitis and other respiratory diseases, HEW, *Air Quality Criteria for Sulfur Oxides* 9-10 to 9-11 (1969), and the 80 $\mu g/m^3$ level for particulate matter was associated with increased death rates for persons over 50 years old, HEW, *Air Quality Criteria for Particulate Matter* 189 (1969). See *1970 Hearings*, *reprinted at* 2 *Legislative History* at 1187. Beyond these fixed ceilings, the states, as part of their risk-management decision making, had the responsibility to set "margins of safety" that would take into account other factors, including "long-term effects on health." *Hearings Before the Subcomm. on Pub. Health and Welfare* (1969), *reprinted in* 2 *Legislative History* at 1255 (excerpts from criteria documents).

The 1970 Amendments intervened before the 1967 Act process was complete. The Nixon Administration pressed for national standards in recognition of the national dimension of pollution, to shift state resources to implementation, and to accelerate a process bogged down in the cumbersome federal-state mechanisms of the 1967 Act. *1970 Hearings*, *reprinted in* 2 *Legislative History* at 974 (statement of Hon. Robert H. Finch, Secretary, HEW). There is no indication anywhere in the legislative history that Congress, in federalizing the standard-setting function, intended to change the factors that could be considered in setting standards. To the contrary, the legislative history is replete with statements that the 1970 Amendments continued the approach of the 1967 Act,[14] and simply transferred the standard-setting function to the federal government. *1970 Hearings*, *reprinted in* 2 *Legislative History* at 983 (statement of Hon. Robert H. Finch, Secretary, HEW). The Administration's testimony before Congress emphasized the continuity with the 1967 Act. The national standards would continue to be below the level at which scientific evidence in the air-quality criteria demonstrated dangers to the public health. *Id.* at 999, 1000 (remarks of John Veneman, Under Secretary, HEW). But now it would be EPA which makes the overall risk-management judgments that formerly belonged to the states, although individual states would be entitled to go farther, *Union Electric*, 427 U.S. at 263-65. Nothing indicates that Congress intended to forbid EPA to consider the factors that states formerly weighed (or that these factors were only to be considered by the states at the implementation stage).[15]

While the 1970 Amendments omit language from the 1967 Act requiring consistency of air-quality standards with "recommended control techniques issued pursuant to section 107," Pub.

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[14] *See* Senate Debate on S. 4358 (Sept. 21, 1970), *reprinted in* 1 *Legislative History* at 227 (remarks of Sen. Muskie) ("That concept and philosophy are behind every page of the proposed legislation."); *see also id.* at 225, 229.

[15] *Cf. 1970 Hearings*, *reprinted in* 2 *Legislative History* at 1186 (remarks of Sen. Baker) (determining where a national standard "ought to be set" requires consideration of, *inter alia*, "the economic impact [of] dislocations").

L. 90-148, § 108(c)(1), 81 Stat. at 492, this does not suggest the contrary. That omission reflects only that feasibility concerns would not trump health given the "'technology-forcing'" character of the 1970 Amendments. *Union Elec.*, 427 U.S. at 257. And, in any case, such language would have been superfluous because weighing costs is subsumed in the authority given to EPA to set "an adequate margin of safety" and make the ultimate determination of what standard is "requisite to protect the public health." The continuing structure of the Act, however, confirms that control technique and cost data gathered under what is now section 108 (formerly section 107 of the 1967 Act) are still available for the Administrator's consideration. Such data still must be compiled and issued "[s]imultaneously" with the criteria documents, 42 U.S.C. § 7408(b)(1), and must be made available for public comment at the same time a NAAQS is *proposed*, *id.* § 7409(a)(1)(B) & (2)—a provision which would make no sense if the Administrator could not consider such data (or comments thereupon) before finalizing the NAAQS. Indeed, the congressional debates indicate that the use of such information in setting standards was contemplated.[16]

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[16] *See* Senate Debate on S. 4358 (Sept. 22, 1970), *reprinted in* 1 *Legislative History* at 341 (remarks of Sen. Randolph) (offering successful amendment requiring advisory committee on control issues because it is "easy for Government to arrive at a set figure for industry to meet without giving due consideration to whether those requirements are obtainable on the basis of available control technology"); House Debate on H.R. 17255 (June 10, 1970), *reprinted in* 2 *Legislative History* at 809 (remarks of Rep. Springer) ("As the scientific details emerge and the control methods are developed, the air quality standards for the entire nation will be adjusted accordingly."). The 1977 legislative history likewise indicates that costs and technology could be considered in setting NAAQS. *See, e.g.*, H.R. Rep. No. 95-294, at 127 (1977) (rejecting argument that NAAQS could be set at a zero-risk level because such an approach "ignores all economic and social consequences and is impractical"); Senate Debate on S. 252 (June 10, 1977), *reprinted in* 3 *Legislative History* at 1030 (remarks of Sen. Muskie) (NAAQS are "the minimum reasonably attainable").

4. *Lead Industries* Is Inconsistent With EPA's Interpretation Of Analogous Provisions Of The Clean Water Act.

Untenable in its own right, EPA's adoption of *Lead Industries* also cannot be reconciled with its interpretation of analogous language in section 303 of the Clean Water Act ("CWA") for setting *water* quality standards. Under section 303, the states set water quality standards based on a designation of the "uses" of a body of water—such as fishing, swimming, drinking, recreation, and protection and propagation of fish and wildlife—and the scientifically derived "water quality criteria" that are required to protect those uses. 33 U.S.C. § 1313(c)(2); EPA, *Water Quality Standards Handbook* INT-8 to INT-10, 2-1 to 2-4, 3-1 to 3-33 (2d ed. 1994) ("*Water Quality Standards Handbook*"). The standards (which are subject to review by the Administrator) must be set "to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). In implementing their water quality management program, states must impose whatever controls are necessary to implement the water quality standards. *Water Quality Standards Handbook* at INT-13.

Despite the similar "protect the public health or welfare" mandate, and no statutory provision for consideration of costs or feasibility,[17] EPA has interpreted section 303 to allow a "cost-sensitive" approach to the setting of water-quality standards. 2 William H. Rodgers, Jr., *Environmental Law: Air and Water* § 4.19, at 291 (1986). Thus, if a particular use is not already

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[17] Of the statutory purposes that may be considered, *see* 33 U.S.C. §§ 1251(a), 1313(c)(2), the only one that mentions feasibility constraints is the provision setting, "wherever attainable, an interim goal" of achieving water quality protective of fish, shellfish, and wildlife by July, 1983. *Id.* § 1251(a)(2). That purpose is irrelevant to the EPA's regulation, which was promulgated in November, 1983 and is still in force. *Cf.* 48 Fed. Reg. 51,405 (1983).

existing, the states or the Administrator (if acting in place of a state) may adjust water quality standards to take into account certain natural or manmade conditions that prevent the attainment of a designated use, 40 C.F.R. § 131.10(g)(1)-(5), collateral environmental damage that would be caused by attempt ing such attainment, *id.* § 131.10(g)(3), and any "substantial and widespread economic and social impact" that would be caused by imposing controls more stringent than those required by other provisions of the CWA, *id.* § 131.10(g)(6). There is no reason to interpret section 109 of the CAA differently.

5. Congress Did Not Intend To Depart From Fundamental Principles Of Risk Management.

Lead Industries is not only contrary to the broad language and history of section 109, but it also failed to recognize the well understood distinction between "risk assessment" and "risk management." Setting a binding air-quality NAAQS is plainly an exercise in risk management, which requires discretion and consideration of non-health factors.

Any regulatory system dealing with hazardous substances "has two basic parts, a technical part, called 'risk assessment,' designed to measure the risk associated with the substance, and a more policy-oriented part, called 'risk management.'" Stephen A. Breyer, *Breaking the Vicious Circle* 9 (1993).[18] "Risk assessment is the systematic, scientific characterization of potential adverse effects of human or ecological exposures to hazardous agents or activities." 2 The Presidential/Congressional Comm'n on Risk Assessment and

[18] The basic framework and terminology for risk regulation was most comprehensively outlined in National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983), based on analysis of then current and prior regulatory schemes. *See id.* at 2.

Risk Management, *Final Report: Risk Assessment and Risk Management in Regulatory Decision-Making* 2 (1997) ("*Commission Report*"). Because of data, measurement, and methodological uncertainties that result in "several scientifically plausible approaches ... with no definitive basis for distinguishing among them," there are policy choices in risk assessment. National Research Council, *Science and Judgment in Risk Assessment* 27 (1994) ("*Science and Judgment*"). But they are strictly "science-policy" choices that "are distinct from the policy choices associated with ultimate decision-making." *Id.* The development of air quality criteria, which catalog the health and welfare effects from the presence of pollutants "in varying quantities," is a risk-assessment activity. 42 U.S.C. § 7408(a)(2).

Risk management, on the other hand, "is the process of identifying, evaluating, selecting, and implementing actions to reduce risk to human health and to ecosystems," with the goal of "scientifically sound, cost-effective, integrated actions that reduce or prevent risks while taking into account social, cultural, ethical, political, and legal considerations." 2 *Commission Report* at 2; *Science and Judgment* at 28 ("*Risk management* is the term used to describe the process by which risk-assessment results are *integrated with other information* to make decisions about the need for, method of, and extent of risk reduction.") (second emphasis added). In making policy choices among regulatory options, the risk manager evaluates, for example, the extent to which the regulation will diminish the risk; the *different* health risks, lost benefits, and costs associated with the regulation; and obstacles to its enforcement. Breyer, *supra*, at 10.

The Administrator's setting of NAAQS, which establishes a legally binding level of risk that governs state regulation of polluting sources, is the fundamental risk-management decision for these pollutants. Yet under *Lead Industries*, all that the Administrator—despite being a senior Cabinet official, subject to the direction of the President, with broad expertise in all aspects of environmental regulation—may do is make the science-policy

choices typically associated with a risk assessment (*i.e.*, the development of air-quality criteria). The Administrator, in this view, must regulate with blinders on, oblivious to whether the standard she sets will harm the public more than an equally scientifically permissible alternative, despite her broad gathering of "data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology," 42 U.S.C. § 7408(b)(1); the advice she receives from CASAC on "adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of [the NAAQS]," *id.* § 7409(d)(2)(C); and her mandate to study the costs and benefits associated with compliance with each NAAQS, *id.* § 7612(a)(1). *Lead Industries* defies not only the statutory text and structure, but also the common sense that *Brown & Williamson* demands. 120 S. Ct. at 1301.

Risk management is especially important when scientific evidence is ambiguous. Particularly in the case of nonthreshold pollutants,[19] science generally draws no bright line between standards that are "protective" and those that would be "unprotective." EPA acknowledges that the Act does not require it to eliminate all health risks, and thus it must draw the line between "protected" and "unprotected" populations. To justify not fully protecting everyone against all adverse health consequences, the agency must balance the relative significance of health risks vis-à-vis abatement costs and other collateral effects. If EPA is to consider stringent ozone and PM regulation in the face of mas-

[19] It has long been understood that ozone, particulate matter, and other criteria pollutants are nonthreshold pollutants, meaning that there is a continuum of adverse health effects at any exposure level above zero. Pet. App. 5a. *See also* Senate Debate on S. 252 (June 8, 1977), *reprinted in* 3 *Legislative History* at 781-82 (remarks of Sen. Muskie) (noting "14 years" of testimony that "[t]here is no threshold health effect which can be used to say that above this threshold there is danger to health and below it there is not").

sive uncertainty, see *supra* at 2-3, at least it should be able to consider the enormous costs of these doubtful precautions.

Thus, to paraphrase the D.C. Circuit's discussion of a closely related provision of the original Act, "[t]hough the phrase 'to protect the public health' evinces an intent to make health the primary consideration, there is no indication of the factors the Administrator may or may not consider in determining, in his 'judgment,' what level of [ambient pollutant] will provide an '[adequate] margin of safety.'" *National Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146, 1155 (D.C. Cir. 1987). The Administrator would not comply with section 109 by setting a standard that did not protect against the level where scientific data demonstrate a significant risk to the public health; she would have failed to set a standard "requisite to protect the public health." But beyond that, the Administrator is free to do what is best for the American public, based on consideration of all relevant factors.

II. CONGRESS HAS NOT ACQUIESCED IN *LEAD INDUSTRIES*.

As Members of Congress, we urge this Court to pay little attention to EPA's argument that Congress has implicitly acquiesced in *Lead Industries* by failing to overrule it in the intervening decades. *PM Rule*, 62 Fed. Reg. at 38,685. This Court rightly looks with great disfavor on arguments of congressional acquiescence. *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 186 (1994). Acquiescence arguments are especially weak here, given that environmental legislation is "always" an area of "legislative struggle." *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 847 (1984). The inability of Congress to overrule a judicial decision favored by certain political interests does not suggest that the decision was rightly decided in the first place. Indeed, far from ratifying *Lead Industries*, Congress has enacted new legislation that unquestionably reflects new statutory imperatives to analyze and con-

sider economic factors, including net benefit maximization and cost-effectiveness, in environmental rulemaking. See *Vermont Agency of Natural Resources* v. *United States*, 120 S. Ct. 1858, 1870 n.17 (2000) ("it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted").

As an initial matter, *Lead Industries* is difficult to reconcile with the 1990 Amendments to the Clean Air Act. This legislation fostered greater EPA responsibility over state implementation in order to promote cost-effective regulation. Two provisions are particularly germane. First, addressing the problems of interstate transport of acid rain and ozone which cannot be mitigated by individual states acting alone, Congress required EPA to order upwind states to curtail emissions that contribute "significantly" to downwind nonattainment, 42 U.S.C. § 7410(a)(2)(D)(i)(I) — so that the Midwestern states have to take action to mitigate the pollution they send eastward to New England and the Mid-Atlantic. EPA has openly (and rightly) interpreted the "significant" contribution rule to allow consideration of the relative costs of reducing pollution, even though the relevant statutory text provides no more express authority for such considerations than does section 109. See *Michigan*, 2000 WL 180650, at *12-*13 (upholding agency interpretation). If it is going to excuse upwind states from full compliance based on costs, EPA must equitably adjust the compliance requirements of downwind states (which cannot attain NAAQS on their own). Second, Congress amended section 110 to provide for the incorporation of economic incentives in state implementation plans ("SIPs"), see 42 U.S.C. § 7410(a)(2)(A). But for such incentives to work, EPA's anticipation of such implementation policies is required at the NAAQS promulgation stage. In other words, considerations of costs and collateral effects permeate the entire NAAQS regulatory scheme, and for that scheme to work rationally, the Administrator must have broad discretion to consider such factors throughout the standard-setting and implementation process. Indeed, Congress in 1990 also directed the Administrator to consider the costs and benefits associated with NAAQS compliance. 42 U.S.C. § 7612(a)(1).

Furthermore, the Clean Air Act must be construed *in pari materia* with later-enacted regulatory reform statutes that direct agencies to favor cost-effective regulatory decisions and to mitigate unwarranted regulatory burdens where possible. See *Vermont Agency*, 120 S. Ct. at 1870 n.17. The Unfunded Mandates Reform Act ("UMRA") requires EPA, like all agencies, to select the most cost-effective regulatory alternative (or, alternatively, to explain why a cost-effective option was not chosen). Pub. L. No. 104-4, § 205, 109 Stat. 64, 66 (1995) (codified at 2 U.S.C. § 1535). The Small Business Regulatory Enforcement Fairness Act ("SBREFA") compels agencies to consider and minimize the "significant economic impact" of regulations on "small entities." Pub. L. No. 104-121, § 241(b)(5), 110 Stat. 847, 864 (1996) (codified at 5 U.S.C. § 604(a)(5)). EPA is correct that UMRA and SBREFA do not override the mandates of an agency's organic statute, see 2 U.S.C. § 1535(b)(2); 5 U.S.C. § 604 (a)(5), but, absent clear inconsistency, the Act should not be interpreted to defeat Congress's clear directive in favor of cost-effective regulation.

III. OVERRULING *LEAD INDUSTRIES* WOULD END THE NAAQS CHARADE.

In the end, the true measure of the unreasonableness of *Lead Industries* is the charade it induces, in which EPA masks its policy judgments as scientific findings to comply with an irrational legal standard. Moreover, EPA, unwilling to force full attainment of NAAQS that are established pursuant to *Lead Industries*, subverts the NAAQS scheme by creating cost-of-compliance caps without authority or explanation. The result is extra-statutory regulation that evades agency accountability to Congress, the courts, and the public.

EPA acknowledges, as it must, that the "Act does not require the Administrator to establish a primary NAAQS at a zero-risk level." *PM Rule*, 62 Fed. Reg. at 38,653. Any contrary construction would be nonsensical for nonthreshold pollutants. But if "zero risk" is neither legally required, nor established as a goal by EPA, then the Agency must justify setting a level of risk that is not stringent enough to protect everyone—*i.e.*, certain groups of unusually sensitive individuals will suffer health impairment while others of average or lesser sensitivity will not.

EPA purports to distinguish among health risks based on " 'decisional criteria' " such as "the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk." Pet. at 15 n.9, *Browner* v. *American Trucking Assn's*, No. 99-1257 (filed Jan. 2000), *Ozone Rule*, 62 Fed. Reg. at 38,883. In truth, these "decisional criteria" imply a *de facto* balancing of net benefits and costs of abatement. How otherwise could EPA defend denying health protections to one population but not another if the costs of protecting them were low? See Breyer, *supra*, at 65 ("tiny costs may warrant stricter standards aimed at tiny risks"). The only democratic and moral justification for setting standards at levels that do not protect all individuals equally against the *same* harms is that doing so would require a disproportionate, cost-ineffective allocation of society's resources.

EPA has acknowledged the widespread, general perception that it adjusts science to fit policy,[20] but in the case of the NAAQS, EPA still refuses to admit it is making economic choices under the guise of "science." Scholars, however, have unearthed evidence that behind closed doors, EPA does consider

[20] EPA, *Safeguarding the Future: Credible Science, Credible Decisions* 36-37 (1992).

costs.[21] By overruling *Lead Industries*, this Court would bring EPA's true bases of decision out of the shadows for judicial, congressional, and public scrutiny, and thus ensure the agency's accountability and fidelity to the Act.

For example, despite its argument that cost considerations and other alleged implementation effects come into play only on a state-by-state basis in the implementation process, U.S. Opp. at 13, EPA established a uniform $10,000 per ton compliance cap in a memorandum issued by the President the same day the two rules were issued. Under the mantle of "cost-effective implementation," an unidentified "interagency Administration group" gave notice on the day the NAAQS were issued that "[i]t was agreed that $10,000 per ton of emission reduction is the high end of the range of reasonable cost to impose on sources," and that "EPA will encourage" (and no doubt approve) SIPS that do not exceed those caps. *Implementation Plan for Revised Air Quality Standards*, 62 Fed. Reg. 38,423, 38,429 (1997). Such a maneuver raises serious questions. There is no mention of any statutory authority for EPA (or the Administration generally) to authorize cost caps that frustrate attainment of the NAAQS, and indeed none exists. There is no rationale given for the $10,000 cap, no explanation of the public-health tradeoffs, and no legal justification of the anti-attainment implications of the $10,000 cap for attainment or its interplay with other implementation mechanisms approved by EPA. It thus appears that it will not be the newly set NAAQS, or even state-by-state decisions, but rather an unexplained administrative policy, un-

[21] Wagner, *supra*, at 1641-43 & n.101 (discussing evidence in an earlier NAAQS rulemaking that "[t]he economic impact of the selected standard or alternate standards ... were clearly considered by the Administrator"); *see also* 1 William H. Rodgers, *supra*, § 3.8, at 252; *PM Rule*, 62 Fed. Reg. at 38,680-82 (declining to set a more stringent secondary PM NAAQS to protect visibility because of costs—the unacceptability of "requir[ing] elimination of all eastern anthropogenic emissions"—and the availability of an alternative control strategy—the regional haze program).

rooted in any statute and unreviewed by any court, that will principally govern the sufficiency of compliance actions under EPA regime.

Even though attainment is the "heart" of the NAAQS scheme, *Train* v. *National Resources Defense Council, Inc.*, 421 U.S. 60, 66-67 (1975), it is a chimera under EPA's current approach. In its *Final RIA*, EPA adopted a $1 billion/µg/m3 cap on PM compliance costs in order "to eliminate control measures that . . . are extremely costly relative to the air quality benefit they achieve." *Final RIA*, at 6-14; *see also* Innovative Strategies and Econs. Group, EPA, Draft Document, *Regulatory Impact Analysis for Proposed Particulate Matter National Ambient Air Quality Standard* 7-6 (Dec. 1996) (control measures beyond the $! billion/µg/m3 cut-off are "extreme measures that are unrealistically cost-ineffective," achieving "minimal air quality improvements at unreasonably high cost"). With such a cap for PM, together with the $10,000-per-ton cap for both pollutants, EPA recognizes that full attainment for ozone and PM would not be achieved during the analyzed period. *Final RIA*, at ES-11 to ES-12. Given the President's direction to the Administrator that the NAAQS "be carried out to maximize common sense, flexibility, and cost-effectiveness," Memorandum of July 16, 1997, 62 Fed. Reg. 38,421, 38,421, EPA will not pursue full attainment. Thus, the overly stringent NAAQS set under *Lead Industries* are nullified through the back door. The purposes of the Act would be better served by considering cost-effectiveness *openly* in setting the NAAQS.

The Government may well argue that its cost-effectiveness strategies are not being provided as part of Section 109, but rather as part of the implementation process under Section 110. But the states have not yet even to begun to work on their SIPs. Moreover, and perhaps more importantly, the Government also argues that Congress reserved for itself the authority to relax attainment requirements if costs become unsustainable. U.S. Opp. at 13-14. Yet, while EPA claims that the law precludes it

from establishing cost-effective cut-offs, it nonetheless goes ahead and does so. And all of this takes place without the agency complying with any objective standards or being subject to any oversight and review.

Compounding the oversight and review problem is the fact that after setting a $10,000-a-ton cut-off for compliance purposes, EPA later set a $2,000-per-ton cap for purposes of determining control of "significant" interstate pollution transport. See *Michigan*, 2000 WL 180650, at *2 (discussing cap for nitrogen oxides, an ozone precursor). This lesser figure leaves downwind states with the obligation to fund up to $10,000-a-ton for reductions that may well be much more cheaply obtained upwind. In fact, the $2,000 transport cap may well operate as a *de facto* cap for *all* sources in the affected upwind states, since those tons that go downwind are indistinguishable from those that do not.

Even if there are no insuperable coordination problems here, surely a reviewing court is entitled to understand how a particular cut-off number is calculated—and whether $10,000 is a lot or a little, and whether the difference between $2,000 and $10,000 is a lot or a little. The D.C. Circuit was presented with reasoning relating to the $2,000 figure in the *Michigan* case. See Brief for Respondent United States at 58-67, *Michigan*, 2000 WL 180650. The reviewing courts—and the states and their sources—are entitled to no less with respect to the far more important and all-encompassing $10,000 number.

In short, Congress intended the cost-effectiveness of NAAQS to be considered, but not as part of a closed-door and unreviewable Administration compromise that effectively undermines the NAAQS scheme. Rather, as the text, history, and structure of section 109 make clear, Congress wanted the EPA Administrator to consider such factors openly in setting NAAQS, subject to judicial review of the adequacy of her reasons and her conformity to the statutory mandate "to protect the public health."

Lead Industries stands in the way of vindication of the congressional scheme, and it should be overruled.

CONCLUSION

For the reasons above, the judgment of the court of appeals should be reversed and the EPA rules remanded.

Respectfully submitted,

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